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ABSTRACT

The Native American Rights Fund is the national legal defense fund for American Indian and Alaska Native tribes. Its Indian Education Legal Support Project advances Native American education by emphasizing the legal rights of tribes to control the formal education of tribal members in all types of schools--federal, state, and tribal. This booklet presents an overview of major legal principles of federal Indian law, major developments in federal Indian policy, and how they have affected the education of American Indians and Alaska Natives. Three fundamental legal principles of federal Indian law are presented: tribes are independent sovereign governments, separate from the states and the federal government; tribal sovereignty generally extends over a federally recognized geographic territory and over the activities and conduct of tribal and nontribal members within that territory; and tribal sovereignty is inherent and exists unless and until Congress takes it away. Court case examples illustrating these principles are given. Since questions about tribal sovereignty are often viewed as questions of the intent of Congress, acts of Congress concerning treaties, statutes, and public laws are reviewed, along with court case examples. A history of federal Indian education laws and policies traces tribal control from pre-contact through Federal control, state control, and finally to the return toward tribal control. Laws and policies that are unique to Alaska Natives are reviewed. "Homework" questions explore implications for American Indian and Alaska Native education. (TD)

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INDIAN EDUCATION LEGAL SUPPORT PROJECT

"Tribalizing Indian Education"

Federal Indian Law and Policy Affecting American Indian and Alaska Native Education

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"Tribalizing Indian Education"

Federal Indian Law and Policy Affecting American Indian and Alaska Native Education

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INDIAN EDUCATION LEGAL SUPPORT PROJECT

Federal Indian Law and Policy Affecting American Indian and Alaska Native Education

INTRODUCTION

These materials are an overview of the major legal principles of federal Indian law and the major developments in federal Indian policy. They are intended to show how the legal principles and policy developments have affected the education of American Indians and Alaska Natives. These materials were developed largely as a result of presentations made during the Regional Partnership Forums mandated by Executive Order No. 13096 on American Indian and Alaska Native Education, signed by President Clinton on August 6, 1998.

These materials are intended to be a general resource for tribal, state, and federal officials, schools, and other interested persons. For further information and reference about Indian education law and policy and the rights and roles of tribal governments in education, please see the first five sets of materials under this project dated October, 1993, October, 1994, October, 1997, October, 1998, October, 1999, and October, 2000. None of these materials is intended to be legal advice for any particular tribe. Tribes should consult their legal counsel for specific advice about the existence and scope of their sovereign authority in education.

The Native American Rights Fund's Indian Education Legal Support Project, "*Tribalizing Indian Education*," is designed to build the capacity of Indian tribes to control education and improve student academic performance.

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Federal Indian Law and Policy Affecting American Indian and Alaska Native Education

TABLE OF CONTENTS

Page

Section 1: Executive Summary of the Project 1

Section 2: Goals of the Project - Tribalizing Indian Education 3

Section 3: Legal Principles of Federal Indian Law 5
- A. Fundamental Principles 5
  - 1. Overview 5
  - 2. Court Case Examples 5
- B. Congressional Intent 9
  - 1. Overview 9
  - 2. Court Case Examples 11
- C. Scope of Sovereignty - Exclusive or Concurrent ... 16

Section 4: History of Federal Indian Education Laws and Policies .. 19
- A. Overview 19
- B. The Journey from Tribal to Federal to State Control, and back toward Tribal Control 20
  - 1. In the Beginning: Tribal Control 20
  - 2. The Assumption of Federal Control 21
  - 3. The Transfer to State Control 21
  - 4. The Return Toward Tribal Control 22

Section 5: Alaska Natives 25
- A. Overview 25
- B. Federal Laws and Policies Unique to Alaska Natives and their Education 25
  - 1. Treaties 25
  - 2. Laws 25
  - 3. Policies 27

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INDIAN EDUCATION LEGAL SUPPORT PROJECT

EXECUTIVE SUMMARY

The Native American Rights Fund

The Native American Rights Fund (NARF) is the national legal defense fund for American Indian and Alaska Native tribes. Founded in 1970, NARF concentrates on bringing cases and reforming laws that are of major importance to a great many Native people. NARF has been consistently at the forefront of issues and developments in Indian law in areas such as Indian treaty rights to land and water, Native religious freedom rights, and the rights of tribes as sovereign governments including tribal rights in education.

The NARF Indian Education Legal Support Project - Tribalizing Indian Education

NARF historically has represented Indian clients on a variety of education issues. Since 1987, NARF has represented the Rosebud Sioux Tribe of South Dakota in establishing a precedent-setting tribal education code and implementing that code through a tribal education department. As a result of its success with the Rosebud Sioux Tribe, NARF started a new project that has been funded primarily by the Carnegie Corporation of New York and the W.K. Kellogg Foundation. The project advances Native American education by emphasizing the legal rights of tribes to control the formal education of tribal members in all types of schools – federal, state, and tribal.

NARF seeks to "tribalize" formal education through developing tribal education laws and reforming state and national Indian education legislation. Tribal education laws are essential to effective tribal control of education, yet few tribes have such laws. Tribal laws are essential to defining each tribe's education rights and goals. Tribal laws are essential to delineating the forum and process for establishing tribal and non-tribal government-to-government relationships and working agreements on common education issues and goals.

The Need is Evident but Affirmative Steps Must Be Taken

Indian tribes are sovereign governments just as their state and federal counterparts. Many federal reports and some federal and state laws have focused on Indian education problems. Some reports and laws have pointed out the need to increase the role of tribal governments to address the problems. But instead of requiring active tribal government involvement, most federal and state education programs and processes circumvent tribal governments and maintain non-Indian federal and state government control over the intent, goals, approaches, funding, staffing, and curriculum for Indian education. And there are no effective programs to establish tribal education codes or operate tribal education departments.

The three sovereign governments in this country have a major stake in Indian education. Common sense dictates that tribal governments have the most at stake because it involves their children, their most precious resource, and their future for perpetuating tribes. Some progress has been made because of Indian education programs, Indian parent committees, Indian school boards, and tribally-controlled colleges. Some progress has been made through a measured amount of tribal control and input under laws that include the Indian Education Act of 1988, the Indian Self-Determination and Education Assistance Act of 1975, the Elementary and Secondary Education Act of 1965, and the Impact Aid Laws of 1950.

Conclusion

More direct tribal control of Indian education is needed, and more direct control is the next logical step for many tribes. Federal reports and recommendations call for partnerships between tribes and state schools, tribal approval of state education plans, and tribal education codes, plans, and standards. Tribal control of education is a fact of life in a small number of tribes and more tribal communities want to assume this control. But tribes have been denied this opportunity and responsibility and have been "out of the loop" for decision-making and accountability. For Indian education to succeed, federal and state governments must allow tribes the opportunity to regain control and make decisions, be accountable, and help shape their children's future and their own future as tribes. NARF intends to ensure that tribes gain the legal control over education that they deserve as sovereign governments and that they must have for Indian education success.

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INDIAN EDUCATION LEGAL SUPPORT PROJECT

Federal Indian Law and Policy Affecting American Indian and Alaska Native Education

GOALS OF THE PROJECT - TRIBALIZING INDIAN EDUCATION

1. To promote sovereign tribal rights and responsibilities in education, including the government-to-government interactions of tribal governments with the federal and state governments;

2. To increase the number of tribal governments that assess their education situation, develop education goals, and exercise sovereign rights through developing and implementing tribal education laws, tribal education standards, and tribal education plans;

3. To increase the number of tribal governments that take more education responsibility, control, and accountability;

4. To assist the federal and state governments in increasing their government-to-government education work with tribal governments and in monitoring that increase within their federal and state agencies and federal and state funded education programs; and,

5. To assist tribes in reforming federal and state Indian education laws and policies and in passing new laws and adopting new policies which enable tribal decision-making, ensure access to resources, and enhance other improvements in Indian education.

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INDIAN EDUCATION LEGAL SUPPORT PROJECT

Federal Indian Law and Policy affecting American Indian and Alaska Native Education

LEGAL PRINCIPLES OF FEDERAL INDIAN LAW

A. Fundamental Principles

1. Overview

"Federal Indian law" is the body of United States law – treaties, statutes, executive orders, administrative decisions, and court cases – that define and exemplify the unique legal and political status of the over 550 federally recognized American Indian and Alaska Native tribes; the relationship of tribes with the federal government; and, the role of tribes and states in our federalism. Federal Indian law has three fundamental legal principles:

a) American Indian and Alaska Native tribes that are recognized by the federal government *are independent sovereign governments, separate from the states and from the federal government.*

b) Unless Congress provides otherwise, the sovereignty of federally recognized American Indian and Alaska Native tribes *generally extends over their federally recognized geographic territory (e.g., reservations, allotments, trust and restricted Indian lands, and other Indian country), including over the activities and conduct of tribal members and non-tribal members within that territory.*

c) The sovereignty of federally recognized American Indian and Alaska Native tribes *is inherent and exists unless and until Congress takes it away.*

2. Court Case Examples

These three fundamental principles of federal Indian law have been recognized since the formation of the United States of America. The

principles are acknowledged in many acts of Congress and many decisions of the United States Supreme Court. The following excerpts from the Supreme Court's decisions are good examples of the acknowledgment of these principles.

- ***Tribes are independent sovereign governments separate from the states and from the federal government.***

In 1832, in the landmark case of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832), which dealt with the issue of the sovereignty of a state in Indian country, the Court explained that tribes are separate sovereigns from the states.

> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with ... [Indian tribes] shall be carried on exclusively by the government of the union.
>
> The Indian nations ... [have] always been considered as distinct, independent political communities ....
>
> The Cherokee nation, then, is a distinct community, occupying its own territory ... in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Worcester v. Georgia, 31 U.S. at 557, 559, & 561.

In 1978, in the case of *United States v. Wheeler,* 435 U.S. 313 (1978), which dealt with the issue of tribal criminal jurisdiction over tribal members, the Court explained that tribes are separate sovereigns from the federal government.

> Before the coming of the Europeans, the tribes were self-governing sovereign political communities.... [They] are, of course, no longer 'possessed of the full attributes of sovereignty.' Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
>
> But our cases recognize that the Indian tribes have not given up their full sovereignty.... Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.
>
> That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power....It follows that when ... [a tribe] exercises this power, it does so as part of its retained sovereignty, and not as an arm of the Federal Government.

United States v Wheeler, 435 U.S. at 322-323 & 328.

- ***Tribal sovereignty extends over tribal territory, including over members and non-members within that territory.***

In 1975, in the case of *United States v. Mazurie,* 419 U.S. 544 (1975), which dealt with the issue of federal and tribal power to regulate the sale of liquor by non-Indians within an Indian reservation, the Court stated the following about tribal sovereignty and tribal territory.

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.... Indian tribes within 'Indian Country'

> are a good deal more than 'private, voluntary organizations'....

United States v. Mazurie, 419 U.S. at 557.

In 1981, in the seminal case of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1981), which upheld the right of tribes generally to tax non-Indians who do business on tribal land, the Court explained the territorial base of tribal sovereignty as follows:

> The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power ... derives from the tribe's general authority, as a sovereign, to control economic activity within its jurisdiction....
>
> We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

Merrion v. Jicarilla Apache Tribe, 455 U.S. at 137 & 142.

- ***Tribal sovereignty is inherent and exists unless and until Congress takes it away.***

In 1978, in the case of *United States v. Wheeler*, 435 U.S. 313 (1978), which dealt with the issue of tribal criminal jurisdiction over tribal members, the Court explained that tribal sovereignty generally is inherent, it is not delegated to tribes by the federal government.

> The powers of Indian tribes, are, in general, 'inherent powers of a limited sovereignty which has never been extinguished.'

United States v. Wheeler, 435 U.S. at 322.

In 1959, in the landmark case of *Williams v. Lee,* 358 U.S. 217 (1959), which held that states have no jurisdiction over civil court actions arising on an Indian reservation and brought by a non-Indian against an Indian, the Court explained the principle that, of the three branches of the federal government (Executive, Legislative, and Judicial), only the legislative branch – Congress – has the power to divest or limit tribal sovereignty.

> The cases in this Court have consistently guarded the authority of Indian governments over their reservations....If this power is to be taken away from them, it is for Congress to do it.

Williams v. Lee, 358 U.S. at 223.

B. Congressional Intent

1. Overview

As cases such as *Williams v. Lee* suggest, questions about tribal sovereignty are often viewed as questions of the intent of Congress. When tribes exercise their sovereignty, or when tribal sovereignty is challenged, the issue of whether the tribe has sovereignty typically turns into an issue of congressional intent. The issue will be resolved by asking the question, has Congress acted to divest or limit tribal sovereignty? Because if Congress has not so acted, then, under the federal Indian law legal principles, the tribal sovereignty remains intact.

How do we know whether Congress intended to divest or limit tribal sovereignty? We look at the acts of Congress – treaties, statutes, public laws – and their legislative history.

- ***Treaties***

Until 1871, the United States government entered into hundreds of treaties on a government-to-government basis with hundreds of American Indian tribes. By most of the treaties, the tribes ceded millions of acres of land to the United States. In exchange, the tribes typically reserved lands not ceded. Only a few treaties have specific language about tribal sovereignty,

but it is understood that treaties generally preserved the sovereignty of tribes over their reserved lands. Also, as part of the price for the lands ceded by tribes, the United States guaranteed tribes protection from states and non-Indians on the reserved tribal lands.

In 1871 Congress passed a law forbidding future treaty making with Indian tribes. 25 U.S.C. § 71. The obligations of existing treaties, however, were expressly left unimpaired. *See Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685, 688 n.4 (1965). Thus, today, Indian treaties continue to constitute a major source of federal Indian law.

- ***Allotment and Cession Acts, Homesteading Acts, and Surplus Land Acts***

After 1871 the federal government continued to deal with Indian tribes by agreements, statutes, and acts that have legal implications similar to treaties. From 1871 to 1934, most of the acts of Congress provided for the acquisition, allotment, and opening to ownership by non-Indians of remaining Indian lands. These land acts are known as Allotment and Cession Acts, Homesteading Acts, and Surplus Land Acts. Often the acts were directed at specific tribes, but there was also the comprehensive General Allotment Act, 25 U.S.C. §§ 331-354, passed in 1887.

These land acts affected most tribes and were successful in reducing Indian land holdings from 138 million acres in 1887 to 48 million in 1934, a loss of 90 million acres. The acts were justified by strong assimilationist policies and a desire to abolish tribal sovereignty and cultures. Today these acts continue to be used as the primary vehicles for divesting or limiting tribal sovereignty.

- ***Modern Federal Indian Laws***

In the 1930s, the policies of allotment and assimilation were seen as failures and were repudiated by the federal government. Federal law and policy generally acknowledged tribal sovereignty. But the federal government had moved away from dealing with Indian tribes on a tribe-by-tribe basis. Comprehensive federal Indian legislation replaced treaties, agreements, and tribe-specific acts. However, some federal laws, primarily those of the 1940s

and 1950s, such as Termination Acts and "Public Law 280," were still directed at specific tribes or groups of tribes.

Some of the leading modern federal Indian laws include: the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479; the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n; and, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1923. These laws are viewed as favorable to tribal sovereignty and cultures.

2. Court Case Examples

There are many U.S. Supreme Court cases about tribal sovereignty. The following are examples of how the Court resolves questions about tribal sovereignty by determining the intent of Congress as expressed in treaties, statutes, and other acts of Congress.

- ***Treaties***

In 1985, in the leading Indian land claims case, *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985), the Court had to determine whether Congress intended to extinguish a tribe's title to certain lands conveyed by the tribe to the State of New York by a treaty that was never ratified by the federal government, thereby making the conveyance unlawful.

> We are similarly unpersuaded by petitioners' contention that the United States has ratified the unlawful 1795 conveyances. Petitioners base this argument on federally approved treaties .... [neither of which] qualifies as federal ratification of the 1795 conveyance.
>
> 'Absent explicit statutory language,' this Court ... has refused to find that Congress has abrogated Indian treaty rights.... Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous....'
>
> In view of these principles, the treaties relied upon by petitioners are not sufficient to show that the United

> States ratified New York's unlawful purchase of the Oneidas' land. The language cited by petitioners, a reference in the 1798 treaty to 'the last purchase' and one in the 1802 treaty to 'land heretofore ceded,' far from demonstrates a plain and unambiguous intent to extinguish Indian title. There is no indication that either the Senate or the President intended by these references to ratify the 1795 conveyance.

County of Oneida v. Oneida Indian Nation, 470 U.S. at 246-248.

In 1979, in the highly controversial decision upholding the treaty fishing rights of the Pacific Northwest Indians, *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979), the Court had to determine what was meant by the treaty language securing to the tribes a "right of taking fish ... in common with all citizens of the Territory." The Court found that the language secured to the tribes the right to harvest a share of each run of anadromous fish that passed through tribal fishing areas, and not merely a right to compete with non-treaty fishermen on an individual basis.

> A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.
>
> Accordingly, it is the intention of the parties ... that must control any attempt to interpret the treaties.
>
> During the [treaty] negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the ... promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. It is absolutely clear ... [that nobody] intended that the ... [Indians] 'should be excluded from their ancient fisheries,' and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas.

Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. at 675-676.

- ***Allotment and Cession Acts, Homesteading Acts, and Surplus Land Acts***

In 1981, in *Montana v. United States,* 450 U.S. 544 (1981), one issue was whether Congress had diminished the sovereignty of a tribe to regulate hunting and fishing by non-Indians on land located within the tribe's reservation, but owned in fee by the non-Indians. The Court found that Congress, in the General Allotment Act of 1887, had diminished generally the tribe's inherent sovereignty to regulate hunting and fishing by non-Indians on non-Indian fee land.

> [N]othing in the Allotment Acts supports the view ... that the Tribe could ... bar hunting and fishing by non-resident fee owners.... There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority.... It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana v. United States, 450 U.S. at 559 n.9.

In 1999, in *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172 (1999), the Court had to determine whether Congress had extinguished or

limited a tribe's treaty hunting, fishing, and gathering rights when it enacted the Minnesota Statehood Act. The Court held that Congress had not done so.

> Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' There is no such 'clear evidence' of congressional intent to abrogate the Chippewa Treaty rights here. This ... [Statehood] Act, makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act. The ... Act is silent in this regard ....

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. at 202-203.

- ***Modern Federal Indian Laws***

In 1974, in the case of *Morton v. Mancari,* 417 U.S. 535 (1974), the Court had to determine whether Congress had repealed an important provision of the Indian Reorganization Act of 1934 -- the federal employment preference for American Indians and Alaska Natives -- by the Equal Employment Opportunity Act of 1972. The Court found that Congress had not done so.

> For several reasons we conclude that Congress did not intend to repeal the Indian preference.
>
> First: There are ... affirmative provisions in the 1964 Act excluding coverage of tribal employment and of preferential treatment by a business or enterprise on or near a reservation. These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or

> near' reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed.... It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference.
>
> Second: Three months after Congress passed the 1972 amendments, it enacted two new Indian preference laws.... It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, condemning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Morton v. Mancari, 417 U.S. at 547-549.

In 1989, in the leading case interpreting the Indian Child Welfare Act of 1978 (ICWA), *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989), the Court had to determine what was the meaning of the term "domicile" as used in the ICWA.

> The meaning of 'domicile' in the ICWA is, of course, a matter of Congress' intent. The ICWA itself does not define it. The initial question we must confront is whether there is any reason to believe that Congress intended the ICWA definition of 'domicile' to be a matter of state law.

> First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA ... that Congress was concerned with the rights of Indian families and Indian communities vis-a-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did not have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.... Under these circumstances it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.
>
> Second, Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile.... Even if we could conceive of a federal statute under which the rules of domicile (and thus of jurisdiction) applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. at 43 & 45-46.

C. Scope of Sovereignty – Exclusive or Concurrent

There is another important legal principle that affects tribal sovereignty. That is the principle of *"exclusivity versus concurrentness."* In Anglo-American law, the sovereign authority of most sovereigns – including the federal government and the states – is not always exclusive of that of other

sovereigns. Sometimes sovereigns have concurrent (shared) authority over territory, activities, and conduct.

For example, many people in the United States pay taxes to more than one sovereign on the same income that they earn. We may earn only one income, but we may pay taxes on that income to the federal government, to a state government, and even to a tribal government. In that situation, the sovereigns have *concurrent* authority over the regulated activity – the earning of income.

In other situations, only one government can regulate. For example, under the United States Constitution, states cannot regulate interstate commerce, or commerce with foreign nations, or commerce with Indian tribes. U.S. Const. art. I, sec. 8, cl. 3. Only the federal government can regulate those activities. *Id.* In that situation, the federal government has *exclusive* sovereignty over the regulation of interstate and foreign commerce, and commerce with Indian tribes.

These principles have been applied in federal Indian law. For example, the U.S. Supreme Court has held that *both tribes and states generally can tax the sales of retail products by non-Indians on an Indian reservation. Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980). In this situation, tribes and states have concurrent sovereignty.

But, while *tribes can tax the income of tribal members that they earn on a reservation, states cannot tax the income of tribal members that they earn on a reservation. Oklahoma Tax Comm'n v. Sac and Fox Nation,* 508 U.S. 114 (1993); *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164 (1973). In this situation, the sovereignty of tribes is exclusive of state sovereignty.

There are two other leading cases on the exclusivity of tribal sovereignty. In *Williams v. Lee,* 358 U.S. 217 (1959), the Court held that tribal sovereignty over civil court actions arising on an Indian reservation and brought by non-Indians against Indians is exclusive of state sovereignty. In *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983), the Court held that tribal sovereignty to regulate the hunting and fishing of non-Indians on tribal land is exclusive of state sovereignty.

Homework Problem:

How would a court decide these issues of tribal sovereignty in the context of Indian education, especially the public schools that are located on reservations or in other Indian country? Can a successful argument be made for exclusive tribal sovereignty over those schools? Or, perhaps because the public schools are political entities of the states, is sovereignty over them concurrent between states and tribes? What evidence of congressional intent is there that bears on the question of tribal sovereignty? Did Congress, in sanctioning the location of public schools on an Indian reservation, intend to divest or limit tribal sovereignty over the schools?

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Federal Indian Law and Policy affecting American Indian and Alaska Native Education

HISTORY OF FEDERAL INDIAN EDUCATION LAWS AND POLICY

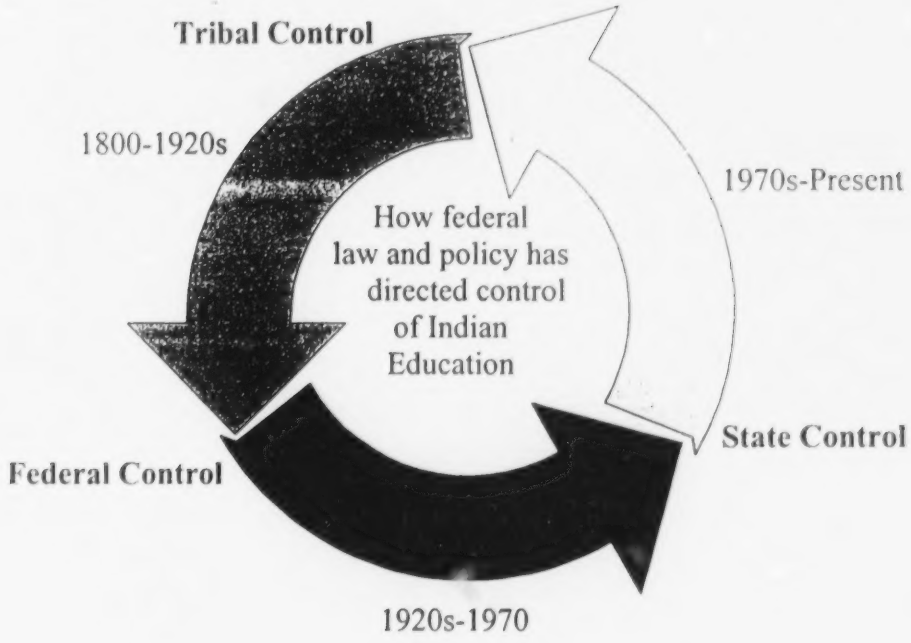
A. Overview

Federal laws and polices have had an enormous impact on American Indian education. First and foremost, they have directed which sovereign – tribal, federal, or state – has primary governance over Indian education. Generally, the course of history has been as follows:

- From the 1800s through the 1920s, federal laws and policies stripped control of Indian education from tribes, and transferred primary control of Indian education to the federal government.

- From the 1920s until the 1970s, federal laws and policies transferred control of Indian education from the federal government to the states and their public schools.

- Since the 970s, federal laws and policies have allowed for tribes to regain some control of Indian education from what they have lost by the previous laws and policies.



Unfortunately, this journey, has not been smooth, largely because the different federal laws and policies have been imposed on top of one another without fully cleaning up the pervious laws and policies.

B. The Journey from Tribal to Federal to State Control, and back toward Tribal Control

1. In the Beginning: Tribal Control

Prior to contact with non-Indians, tribes had total responsibility for educating their members. Although each tribe is different, it was generally through family, clan, and community systems that tribal children were given daily and continuing instructions in survival, social and spiritual skills, relations, and values. Tribal education processes, content, and goals were effective as evidenced by thriving tribal cultures and economies.

2. The Assumption of Federal Control

After the formation of the United States of America, the federal government assumed primary responsibility for the education of American Indians. Beginning in 1794, in treaties with tribes, the federal government typically agreed to provide education services to tribes as part of its payment for the land ceded by tribes. Annual authorizations for Congress to make appropriations for Indian education began in 1802.

The treaty provisions on education were addressed largely by the establishment of hundreds of federal Indian boarding and day schools located on and off Indian reservations. For the most part, the education provided by the government in these schools was technical and vocational training in agriculture or the industrial arts. In many instances, the government contracted with religious denominations who would then provide the schooling for American Indians. In the late 1800s, in an effort to promote compliance with federal compulsory school attendance laws for Indians, Congress on occasion would deny rations to those Indian families whose children did not attend school.

It is important to remember that "Indian education policy developed as an integral part of the federal government's general policy of 'civilizing' the American Indian." Felix S. Cohen, *Handbook of Federal Indian Law* 678-679 (1982 ed.). Nevertheless, it is significant that the treaty provisions continue to this day to impose a duty on the federal government to provide educational services for Indians. *See, Prince v. Board of Educ.*, 543 P.2d 1176, 1184 (N.M. 1975).

3. The Transfer to State Control

As early as 1917, the Commissioner of Indian Affairs was of the view that state public schools, not the federal government, should meet most of the Indians' educational needs. This view was driven largely by economic and assimilationist goals. Federal law and policy began to reduce the federal role in Indian education.

Then, in 1928, the federal Indian school system was among the aspects of federal Indian policy that were harshly criticized in the widely received "*The Problem of Indian Administration*" (also known as "*The Meriam*

Report"). And justifiably so, for the conditions at the many of the schools – especially the off-reservation boarding schools – were physically and emotionally damaging to Indian students.

This prompted the transfer of the primary responsibility for the formal education of American Indians from the federal government to the states. "Integrating American Indian children into the public school system became the BIA's educational policy from the 1930's (sic) to the 1970's (sic)." Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian People*, 21 U.Ark. Little Rock L. Rev. 941, 960 (1999). Many of the federal boarding and day schools were closed; other school properties were conveyed to the states.

In exchange for educating Indians, the states insisted on federal funding. The Johnson O'Malley Act of 1934, 25 U.S.C. §§ 452-458e authorized the Secretary of the Interior to contract with states for, among other things, the education of Indians. The Impact Aid Law of 1950, Pub. L. No. 81-874, authorized federal payments to public school that serve children residing on Indian trust lands that are exempt from state property taxation. With the exception of some remaining federal Indian schools, the federal role in Indian education became primarily financial. Control of education standards, policies, and teaching methods for American Indians was vested in the states.

4. The Return Toward Tribal Control

By the 1960s, the progress and treatment of American Indians in the public schools was under review by the U.S. Senate. *See generally* Subcommittee on Indian Education, Committee on Labor and Public Welfare, U.S. Senate, *The Education of American Indians* (1969) (also known as "*The Kennedy Report*"). This Report noted that Indian students had disproportionately high illiteracy and drop out rates, and that the public schools largely ignored their needs and culture. For these problems, the Report primarily blamed federal Indian policy, which did not allow Indian control of or participation in education. Simply put, state public schools were not required – nor did they choose – to involve tribes or Indian parents in education or to offer education beyond the basic non-Indian curriculum.

Part of the federal response was laws such as the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, and the Indian

Education Act of 1972, Pub. L. No. 92-318. These laws recognize that American Indians and other disadvantaged students have special academic needs. They generally provide for discretionary grants to those public schools that wish to address these needs. In exchange for the federal funding, the schools typically must allow some input by Indian parents into the discretionary programs.

For many tribes, and for the growing numbers of Indian educators, this was not enough. "The acknowledged twin failure of federal and state Indian education required by the late 1960's (sic) a new departure." Raymond Cross, *American Indian Education* at 963. That change came in 1970, when President Nixon announced a new Indian Self-Determination Policy. Congress turned this policy into law in 1975 with the passage of the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638.

Since the 1970s, federal Indian education law and policy has emphasized Indian self-determination and tribal control. This is reflected in many statutes, including the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n; the Impact Aid Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2315; the Tribally Controlled Community College Assistance Act of 1978, 25 U.S.C. §§ 1801-1815; the Tribally Controlled School Grants Act of 1988, 25 U.S.C. §§ 2501-2511; and, the Native American Language Act of 1990, 25 U.S.C. §§ 2901-2906.

These modern federal Indian education statutes allow tribes to operate schools and education programs formerly run by the federal government, or they support tribes in setting up new learning institutions such as tribal colleges and universities. Some of the laws allow a measured amount of tribal input into federal programs, including programs that serve Indian students in the public schools. Current federal Indian education policy generally is to help tribes achieve greater control over and involvement in their formal education, whether the education is provided by the federal, state, or tribal government.

Nevertheless, in 1991, the U.S. Department of Education deemed American Indian and Alaska Native tribes "nations at risk." "Our schools have failed to nurture the intellectual development and intellectual performance of many Native children, as is evident from their high drop out rates and negative attitudes towards school." Final Report of the Indian Nations at Risk Task Force, U.S. Department of Education, *Indian Nations at*

Risk: An Educational Strategy for Action at 1 (October 1991). Among the recommendations of the *Indian Nations at Risk* Report was that the federal government "promote legislation that will require public and Bureau of Indian Affairs schools to include the participation of tribes, Native communities, and parents of Native children in the development, implementation, and evaluation of local, state, and federal [education] plans.

Largely in response to the *Indian Nations at Risk* Report, and driven by the leadership of tribes and national Indian education organizations, on August 6, 1998, President Clinton signed Executive Order No. 13096, entitled *American Indian and Alaska Native Education*. 63 Fed. Reg. 42,681 (1998). The Executive Order notes that the "Federal Government is committed to improving the academic performance and reducing the drop out rate of American Indian and Alaska Native students." The Order further states that "a comprehensive Federal response is needed to address the fragmentation of government services available to American Indian and Alaska Native students and the complexity of intergovernmental relationships affecting the education of those students."

Homework Problems:

1. Tribes now operate by contracts or grants 120 elementary and secondary schools that were formerly operated by the Bureau of Indian Affairs. Are these successful examples of tribal sovereignty and a congressional policy of Indian Self-Determination?

2. Tribes have started 29 tribally controlled colleges and universities. Are these successful examples of tribal sovereignty and a congressional policy of Indian Self-Determination?

3. About 450,000 elementary and secondary tribal students attend state public schools, including about 225,000 students who attend public schools located on or near Indian reservations or other Indian country. What does this say about tribal sovereignty and the congressional policy of Indian Self-Determination?

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Federal Indian Law and Policy affecting American Indian and Alaska Native Education

ALASKA NATIVES

A. Overview

There are about 225 federally recognized Alaska Native tribes with a combined population of over 85,000 tribal members. Generally, the same principles of federal Indian law that apply to American Indian tribes that are located in the Lower Forty-Eight States and are recognized by the federal government also apply to federally recognized Alaska Native tribes. Many of the federal laws and policies pertaining to the education of American Indians also pertain to Alaska Natives. The following are some laws and policies that are unique to Alaska Natives and their education.

B. Federal Laws and Policies Unique to Alaska Natives and their Education

1. Treaties

The United States assumed legal control of Alaska Natives in the Treaty of Cession from Russia in 1867.

2. Laws

By the Act of January 27, 1905, 33 Stat. 619, the federal government assumed primary authority for the education of Alaska Native children. This assumption of authority was addressed by the establishment of as many as ninety government boarding and day schools within Alaska Native communities located in the Territory of Alaska, and by the right of Alaska Native children to attend government Indian schools in other U.S. Territories and states.

By the Act of March 3, 1917, 39 Stat. 1131, the Territory of Alaska was allowed to establish public schools. Upon statehood in 1959, the Alaska Constitution provided for a statewide public school system. Alaska Native children have a state constitutional right to this state public school education. *Hootch v. Alaska State-Operated School System,* 536 P.2d 793 (Alaska 1975).

Federal financial assistance programs for public schools, including the public schools in Alaska, such as Impact Aid and the Elementary and Secondary Education Act (Title I; Bilingual Education) came about in the 1950s and 1960s.

Alaska Native tribes generally are included in the modern federal Indian laws that pertain to Indian tribes in the Lower Forty-Eight States such as the Indian Self-Determination and Education Assistance Act of 1975.

But, in 1971 Congress passed the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-1628. Among other things, ANCSA was used to extinguish the title of Alaska Natives to millions of acres of land. Under ANCSA, Alaska Natives retained about forty-four million acres, but this land is generally held in fee simple by state-chartered private business corporations whose shareholders are Alaska Natives.

In 1998, in the controversial case of *Alaska v. Native Village of Venetie Native Tribal Government,* 522 U.S. 520 (1998), the Court found that Congress intended ANCSA to divest Alaska Native tribes generally of their tribal sovereignty over these remaining lands. This decision severely limits the sovereignty of Alaska Native tribes. Without territory, it is difficult for them to exercise their sovereignty, particularly over non-tribal members.

In 1994, as part of the Improving America's Schools Act, Amendments to the Indian Education Act of 1972 (Title IX), added a new part (Part C), entitled "Alaska Native Educational Equity, Support, and Assistance Act." This part authorized new supplemental educational planning, curriculum development, and teacher training and recruitment programs for Alaska Natives in public schools.

3. Policies

In the 1980s and 1990s – over the extreme objection of Alaska Natives – the federal government transferred all of the remaining government schools that it had established for Alaska Natives to the State. Also over the objections of Alaska Natives, Congress repeatedly has prohibited specific federal Indian education funds – including Indian Self-Determination and Education Assistance Act funds administered by the Bureau of Indian Affairs – from going to support the operation of federal elementary and secondary schools in Alaska.

These policies have essentially deprived Alaska Native tribes of any opportunity for "tribal schools." In contrast, Lower Forty-Eight tribes may operate by grant or contract the Indian schools and Indian education programs which were formerly run by the federal government.

Homework Problem:

How is Alaska Native tribal sovereignty different from that of American Indian tribes in the Lower Forty-Eight states? If Congress intends to treat Alaska Native tribes differently from American Indian tribes, is that justified? How?